



FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK

CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS

Amendment No.: 2209.13-2020-5

Effective Date:

Duration: This amendment is effective until superseded or removed.

Approved:

Associate Deputy Chief

Date Approved:

Posting Instructions: Amendments are numbered consecutively by Handbook number and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this Handbook was 2209.13-2005-10 to 2209.13_50.

New Document	2209.13_50	21 Pages
Superseded Document(s) by Issuance Number and Effective Date	2209.13_50 (Amendment 2209.13-2005-10, 09/09/2005)	6 Pages
	2209.13, 50 Contents (Amendment 2209.13-92-1, 08/03/1992)	1 Page
	2209.13, 50 (Amendment 2209.13-92-1, 08/03/1992)	2 Pages

Digest: Changes the previous names of this chapter from “Other Permits” (8/3/1992) and “Grazing with Tribal Treaty Rights” (7/19/2005) to “Tribal Treaty Authorizations and Special Use Permits” since this chapter covers the execution of tribal treaty or other reserved rights as well as special use permits. Major revisions include:

50 - Creates a brief section on tribal rights and sovereignty. This includes subsections to include pertinent information found in FSM 1563 – Tribal Relations.

50.1 - Inserts a section titled “The Rights of American Indians and Alaska Natives.”

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

Digest--Continued:

50.2 - Inserts a section titled “Tribal Sovereignty.”

50.3 - Inserts a section titled “Treaty and Other Reserved Rights.”

50.4 - Inserts a section titled “Reserved Rights Doctrine.”

51.1 - Changes the caption from “Grazing Permits Issued to Tribes in Recognition of Treaty Rights” and issues the new caption of “Authority.”

51.1 - Expands and clarifies direction regarding grazing of livestock under treaties on National Forest System lands based on treaty and other reserved rights of Tribes. Explains this government-to-government relationship is unique, and distinct from other interests and constituencies served by the Agency.

51.2 - Inserts a new section titled “Definitions.”

51.3 - 51.31 - Deletes these two codes from the August 3, 1992 issuance and their obsolete direction regarding issuance of term grazing permits covering use on developing ranges in the eastern forests.

51.3 - Creates a new code 51.3. Moves the content here from code 51.1 in the 2005 issuance but retains the same caption of “Grazing Permits Issued to Tribes in Recognition of Treaty Rights.”

51.31 - Changes this code from 51.11 in the 2005 issuance but retains the content of “Nature of Treaty or Other Rights.” Additional content is added to this section.

51.32 - Changes this code from 51.12 in the 2005 issuance but retains the same caption and content of “Scope of Treaty Rights.” The section clarifies the scope of rights that may be reserved by Tribes who have treaties with the United States.

51.33 - Changes this code from 51.13 in the 2005 issuance but retains the same caption and content of “Treaty Right Beneficiaries.” Clarifies that only the tribe with whom the United States entered a treaty may claim rights under that treaty and that, where such rights exist, it is the tribe’s responsibility to allocate the grazing among its enrolled members.

51.33 - Inserts a clarification that the tribe may not allocate reserved or granted grazing treaty rights to non-tribal members.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

Digest--Continued:

51.34 - Changes this code from 51.14 in the 2005 issuance but retains the same content. The section is now titled “Extent of Treaty or Other Reserved Rights on National Forest System lands.” Clarifies that while a Tribe may possess treaty or other reserved on National Forest System lands, it is the responsibility of the authorized officer to determine whether and how those rights may be exercised.

51.35 - Changes this code from 51.15 in the 2005 issuance but retains the same caption and content of “Grazing Reductions on National Forest System lands.” Clarifies direction on how reductions in grazing should be made where treaty or other reserved rights are involved.

51.36 - Changes this code from 51.16 in the 2005 issuance but retains the same caption and content of “Fees Charged for Tribal Exercise of Treaty or Other Reserved Rights.”

51.37 - Changes this code from 51.17 in the 2005 issuance but retains the same caption and content of “Internal Review and Coordination.” The section provides direction on review and coordination with regional managers and Office of General Counsel specialists when treaty or other reserved rights are involved.

52 - Establishes a new code for “Methods of Permit Issuance to Execute Treaty or Other Reserved Rights” and describes a process and documentation to meet responsibility to manage all grazing activities on National Forest System lands.

52 - Discusses types of documents that can, and cannot, be used to execute tribal treaty or other reserved rights.

52.1 - Adds a new section titled, “Tribal Ownership of Both Land and Livestock” and explains how to execute tribal treaty or reserved rights where this situation exists.

52.2 - Adds a new section titled, “Tribal Ownership of Lands but not Livestock” and explains how to execute tribal treaty or reserved rights where this situation exists.

52.3 - Adds a new section titled, “Tribal Ownership of Livestock but not Lands” and explains how to execute tribal treaty or reserved rights where this situation exists.

52.4 - Adds a new section titled, “The Tribe Owns Neither Land nor Livestock” and explains how to execute tribal treaty or reserved rights where this situation exists.

52.5 - Adds a new section titled, “The Tribe and the Members Both Hold Title to the Land” and explains how to execute tribal treaty or reserved rights where this situation exists.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

Digest--Continued:

53 - Establishes a new code, “Grazing by Tribes and Tribal Members on National Forest System Lands Not Subject to Treaty or Reserved Rights.” The section explains that if no treaty rights exist for grazing or pasturing stock, that permits issued to Indians are in accordance with the same policies and procedures as apply to permits issued to non-Indians.

54 - Establishes a new code, “Special Use Permits that Authorize Grazing Use.” The section provides information and examples for when grazing use should properly be authorized by issuance of a special use permit.

54.1 - Inserts a new section titled, “Grazing Authorized by Special Use Permit” and explains situations whereby special use permits should be issued and the fees charged for the authorized use.

54.1 - Provides information regarding coordination and administration of outfitter and guide operations when forage utilization guidelines apply to such operations.

54.2 - Inserts a new section titled “Types of Special Use Permits for Incidental Grazing” and discusses the two types of special uses that are most often permitted for these incidental uses.

54.2 - Provides information regarding coordination and administration of Livestock Area and Convenience Enclosure special use permits, especially when a grazing permit and special use permit are held by the entity and/or in the same vicinity.

54.3 - Inserts a new section titled “Expiration and Issuance of Special Use Permits for Incidental Grazing.” Provides a detailed explanation of when grazing permits and special use permits expire. It also discusses historical and proper reasons for not converting the two permit types.

55 - Inserts a new section titled “Coordination of Recreation Special Event Permits.”

56 - Inserts a new section titled “Administration of Cow Camps.” Explains that the type of permit issued to occupy and use the “cow camp” is dependent upon the ownership of the facility.

56.1 - Inserts a new section titled “Government Ownership, Administration through Term Grazing Permit.” Discusses permit issuance and requirements when the cow camp is authorized as a range improvement on the term grazing permit.

56.2 - Inserts a new section titled “Private Ownership, Administration through Special Use Permit.” Discusses permit issuance and requirements when the cow camp is authorized as a special use permit for a Range Facility for allotment management only.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

Digest--Continued:

56.3 - Inserts a new section titled “Private Ownership, Use is for more than Allotment Management.” Discusses permit issuance and requirements when the primary purpose and use of the cow camp is not for management of the allotment. In such cases, use and maintenance are subject to Occupation Safety and Health Administration standards for public health and safety.

56.4 - Inserts a new section titled “Administration Coordination with Heritage Resources.” Discusses what may be required—and may not be required—to maintain the context and the integrity of the cow camp once it has been in existence for more than 50 years and has been evaluated for eligibility for nomination to the National Register of Historic Places.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

Table of Contents

50 – TRIBAL RIGHTS AND SOVEREIGNTY	7
50.1 – The Rights of American Indians and Alaska Natives.....	7
50.2 - Tribal Sovereignty	8
50.3 - Treaty and Other Reserved Rights	8
50.4 - Reserved Rights Doctrine.....	9
51 - GRAZING UNDER TRIBAL TREATY OR OTHER RESERVED RIGHTS	10
51.1 - Authority.....	10
51.2 - Definitions	10
51.3 - Grazing Permits Issued to Tribes in Recognition of Treaty Rights.....	10
51.31 - Nature of Treaty or Other Reserved Rights	11
51.32 - Scope of Treaty Rights	11
51.33 - Treaty Right Beneficiaries.....	11
51.34 - Extent of Treaty or Other Reserved Rights on National Forest System Lands	11
51.35 - Grazing Reductions on National Forest System Lands	12
51.36 - Fees Charged for Tribal Exercise of Treaty or Other Reserved Rights.....	12
51.37 - Internal Review and Coordination.....	13
52 - METHODS OF PERMIT ISSUANCE TO EXECUTE TREATY RIGHTS.....	13
52.1 - Tribal Ownership of Both Land and Livestock	14
52.2 - Tribal Ownership of Land but not Livestock	15
52.3 - Tribal Ownership of Livestock but not Lands.....	15
52.4 - The Tribe Owns Neither Land nor Livestock.....	15
52.5 - The Tribe and the Members Both Hold Title to the Lands	16
53 - GRAZING BY TRIBES AND Tribal Members ON NATIONAL FOREST SYSTEM LANDS NOT SUBJECT TO RESERVED OR GRANTED TREATY RIGHTS....	16
54 - SPECIAL USE PERMITS THAT AUTHORIZE INCIDENTAL GRAZING USE.....	17
54.1 - Special Use Permit to Authorize Outfitter and Guide Grazing	17
54.2 - Incidental Grazing Authorized by Special Use Permit.....	18
54.3 - Types of Special Use Permits for Incidental Grazing	18
54.4 - Expiration and Reissuance of Special Use Permits for Incidental Grazing	19
55 - COORDINATION OF RECREATION SPECIAL EVENT PERMITS	19
56 - ADMINISTRATION OF “COW CAMPS”	19
56.1 - Government Ownership, Administration through Term Grazing Permit.....	20
56.2 - Private Ownership, Administration through Special Use Permit.....	20
56.3 - Private Ownership, Use Is for More than Allotment Management.....	21
56.4 - Administration Coordination under the National Register of Historic Places Heritage Resources	21

FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS

50 – TRIBAL RIGHTS AND SOVEREIGNTY

The United States Constitution outlines the unique political and legal relationship between Tribes and the federal government. Article 1, Section 8, Clause 3, gives Congress the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Tribes”. Article II, Section 2, Clause 2, known as the treaty clause, grants authority to the President to make treaties with the advice and consent of the Senate. In full, this clause states the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”

Under Article VI, Clause 2, treaties are recognized as a supreme law of the land and States must recognize treaties even if they conflict with State constitutions or laws. This clause, known as the supremacy clause, states “[T]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Under these treaties, tribes ceded significant portions of their aboriginal lands to the United States. Each of these treaties is unique but, generally speaking, tribes reserved separate, isolated reservation homelands under the treaties and sometimes retained certain rights to hunt, fish, graze, and gather on the lands ceded to the United States. These rights retained on ceded lands are known as “off-reservation treaty rights” or “other reserved rights.”

Lastly, the Federal Property Clause in Article IV, Section 3, Clause 2 establishes Congress’ authority to dispose of and make all rules and regulations respecting the territory or property of the United States. It states “The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.” Since lands held in trust by the United States on behalf of Tribes are sometimes considered a “territory or property of the United States,” the Federal Property Clause may apply to tribal lands.

50.1 – The Rights of American Indians and Alaska Natives

The legal position of federally recognized tribes in the United States (which includes Alaska Native villages), acknowledges both their status as U.S. citizens entitled to the same legal rights and protections under the Constitution of all U.S. citizens, but who are self-governing, sovereign nations. This unique political and legal status has resulted in a complex relationship between tribes and the Federal government, and a legal foundation that recognizes tribal sovereignty, treaty provisions, and the "reserved rights" doctrine, which holds that tribes retain all rights not explicitly abrogated in treaties or other legislation.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

50.2 - Tribal Sovereignty

Tribal sovereignty refers to the fact that each federally recognized Tribe has the inherent right to govern itself. Though it varies, tribal sovereignty is generally exercised to form tribal governments; to determine tribal membership; to regulate individual property; to levy and collect taxes; to maintain law and order; to exclude non-members from tribal territory; to regulate domestic relations; and to regulate commerce and trade.

Per FSM 1563.03, [A]ll Forest Service personnel shall respect and uphold the sovereignty of all federally recognized tribal governments. This policy does not diminish any tribal governmental rights, including treaty rights, other reserved rights, sovereign immunities or jurisdiction.

Additionally, this policy does not diminish any rights or protections afforded American Indian and Alaska Native persons or entities under Federal law, and Forest Service offices, units, and staffs shall implement Forest Service programs and activities consistent with and respecting tribal treaty and other reserved rights, and fulfilling the Federal Government's legally mandated trust responsibility to Tribes.

50.3 - Treaty and Other Reserved Rights

Agreements between the United States and Tribes were codified in treaties, which are agreements formally signed, ratified, or adhered to by two or more sovereign states. After the American Revolution, the Federal government used treaties as its principal method for acquiring land from the Indians. From the first treaty with the Delaware in 1787 to the end of treaty making in 1871, the Federal government signed over 300 tribal treaties. Although specific treaty elements varied, treaties commonly included such provisions as a guarantee of peace; a cession of certain delineated lands; a promise by the United States to create a reservation for the Indian tribes under Federal protection; a guarantee of tribal hunting and fishing rights.

While most federally recognized Tribes received Federal recognition status through treaties, other tribes did so through acts of Congress, presidential Executive Orders or other Federal administrative actions, or Federal court decisions.

There are three basic "canons of construction" that the Supreme Court has established for interpreting treaty language. First, uncertainties in Indian treaties should be resolved in favor of the Indians. Second, Indian treaties should be interpreted as the Indians signing the treaty would have understood them. Third, Indian treaties are to be liberally construed in favor of the Indians involved. Courts have consistently upheld these principles of treaty interpretation, which clearly favor the Indians, on the basis that Tribes were the much weaker party in treaty negotiations, signing documents written in a foreign language and often with little choice.

These canons were first developed in the context treaty interpretation, but the courts have consistently extended them to non-treaty sources of positive law such as agreements, statutes, executive orders, and federal regulations. When a statute is clear on its face, however, the

FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS

canons of construction will not come into play. [See *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian National* 502 US 251, 269 (1992)] When we are faced with these two possible construction [of a statute], our choice between them must be dictated by a principle deeply rooted in the Court's Indian jurisprudence: "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit." Quoting *Montana v. Blackfeet Tribe* 471 US 759, 767-68 (1985)].

50.4 - Reserved Rights Doctrine

Another crucial factor in the interpretation of treaties is what is known as the reserved rights doctrine, which holds that any rights the tribe possessed before the treaty that are not specifically addressed in a treaty are reserved to the tribe. In other words, treaties outline the specific rights that the tribes gave up, not those that they retained. The courts have consistently interpreted treaties in this fashion, ruling that a treaty is "not a grant of rights to the Indians, but a grant of rights from them." *United States v. Winans*, 198 U.S. 371 (1905). Any right not explicitly extinguished by a treaty or a Federal statute is considered to be "reserved" to the tribe.

One of the clearest examples of reserved rights in practice is hunting and fishing rights that were reserved by federally recognized tribes in treaties signed with the Federal government. In treaties that ceded lands, tribes' continued hunting and fishing rights were often explicitly guaranteed. In many cases the right to hunt and fish were reserved in traditional hunting and fishing locations, even if those areas were outside the reservations.

Only Congress may abolish or modify treaties or treaty rights.

NOTE: When dealing with Indian treaties and tribal relations, in no case should the use of the words "right" and "privilege" be confused with the determination of the U.S. Supreme Court that the ability to hold a Term Grazing Permit from the Forest Service is not a "right" but a "privilege" and therefore not subject to a "takings" under the U.S. Constitution.

50.5 - Trust Responsibility

The federal Indian trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward tribes [*Seminole Nation v. United States*, 316 U.S. 286 (1942)]. The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. (See also FSM 1563.9b).

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

51 - GRAZING UNDER TRIBAL TREATY OR OTHER RESERVED RIGHTS

51.1 - Authority

The history of Federal policies, treaties, statutes, court decisions, and Presidential direction regarding Tribes and tribal rights and interests is extensive. The relationship between the United States and Tribes extends to all Federal agencies.

This government-to-government relationship is unique, and distinct from that of other interests and constituencies served by the Forest Service (*see* FSM 1563 and sec. 50 above).

51.2 - Definitions

Treaty language can vary greatly; they can be very specific or are sometimes general in nature. Refer to the Introduction Sections above, and FSM 1560 for exact definitions and legal standing.

51.3 - Grazing Permits Issued to Tribes in Recognition of Treaty Rights

Some National Forest System (NFS) lands originally came into Federal ownership as a result of treaties negotiated with Tribes, which ceded certain lands to the United States in return for the designation of other land as a permanent reservation for the tribes. In some treaties, Tribes reserved certain rights on the ceded land. For example, one type of off-reservation right identified in some treaties included the grazing or pasturing of stock or livestock.

Sometimes treaty rights were reserved exclusively to the tribe; in other situations the rights were reserved to the tribe *in common with* other users (that is, nontribal users).

Some treaties refer specifically to grazing on the ceded land; in other cases, treaties refer specifically to grazing on *unclaimed land*. Where the treaty reserves grazing on “unclaimed lands,” it is necessary to identify the location of these lands and determine whether the Tribe or its members were grazing livestock in this area at the time of the treaty.

Ambiguous treaty provisions are also to be interpreted in the Tribe’s favor. Similarly, the “reserved rights doctrine” states that Tribes retain all rights not explicitly abrogated in treaties or other legislation. (See FSM 1563.8b). Where a Tribe’s claim of treaty rights involve grazing on NFS land, the authorized officer should carefully review the specific language of the treaty and consult with the regional rangeland management specialist, Office of the General Counsel (OGC), and the tribe regarding the scope and applicability of the tribe’s grazing rights on NFS lands.

Additional information regarding treaty and other rights can be found in FSM 1563.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

51.31 - Nature of Treaty or Other Reserved Rights

The Forest Service may not deprive Tribes or their individual members of treaty or other reserved rights. However, the authorized officer, acting on behalf of the Secretary of Agriculture, may regulate such grazing rights for the purpose of protecting and conserving Forest Service-administered resources (see sec. 52).

51.32 - Scope of Treaty Rights

The scope of a reserved treaty or other reserved right is defined by the specific language in the treaty. In some instances, the treaty may restrict grazing to the lands ceded to the United States; in other instances, the treaty may have reserved grazing to unclaimed land.

51.33 - Treaty Right Beneficiaries

The only party that can claim the reserved right to graze on NFS land under a treaty with the United States is the tribe with whom the treaty was negotiated. Only those lands covered by a treaty or other reserved right shall be affected. Once the scope of the treaty is defined, the tribe determines how to allocate the grazing among its enrolled members.

Under no circumstances may the tribe allocate grazing reserved or granted under a treaty to non-members.

For livestock grazing on NFS lands that is not associated with executing treaty or other reserved rights, the authorized officer shall administer permits issued to tribes and tribal members in accordance with the same policies and procedures that apply to permits without treaty rights (*see* sec. 53).

51.34 - Extent of Treaty or Other Reserved Rights on National Forest System Lands

If an Tribe is unable or unwilling to exercise the full extent of its treaty or other reserved right through the issuance of tribal-issued permits to tribal members, the authorized officer may then issue a term grazing permit to anyone else who satisfies the requisite eligibility and qualification requirements set forth in chapter 10 of this Handbook.

If the intention is to issue a permit to any entity other than the qualified tribe, the authorized officer shall consult with the tribe before accepting a request and approving an application for a grazing permit. The terms and conditions of the permit shall be amended to include a clause which States that the permit may be canceled, in whole or in part, if the tribe chooses to exercise, in full, their treaty grazing rights in the area. Policy and protocols for tribal consultation can be found in FSH 1509.13.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

In the event such a situation occurs, the permittee may be eligible for compensation for improvements as described in FSM 2248 (*see* also chapter 70 of this Handbook).

51.35 - Grazing Reductions on National Forest System Lands

In the event that the authorized officer determines that it is necessary to reduce grazing on NFS lands and treaty or other reserved rights are involved, the allocation of reductions may depend on whether the rights in the treaty were reserved exclusively by the Tribe or grazed in common with other nontribal users.

Where treaty or other reserved rights are the subject of an exclusive reservation in the treaty, the authorized officer shall first reduce term grazing permits issued to non-treaty right holders, if such permits exist. Permits issued pursuant to the treaty or other reserved rights shall only be made when reductions to all other grazing permits are still not adequate to accomplish legal or resource management objectives.

Whenever treaty or other reserved rights are exercised, and it is determined that reductions of existing term permits will result, current permittees will be informed by certified letter that the needed reduction will not take effect for one year from the date of the letter. This gives the permittee(s) time to attempt to locate other lands potentially available for lease or purchase. The authorized officer should make every effort during that same time to determine other locations where the lost capacity could be re-issued on NFS lands.

Whenever the existing permittee(s) loses 20 percent or more of the existing permitted numbers and/or season of use as a result of the treaty or other reserved rights to be granted, a time frame of no less than two years should be approved for replacement lands or capacities to be located. If the tribe and the existing permittee(s) can agree upon some other arrangement, including a longer period of time, the authorized officer should approve it and document that decision in writing.

Where treaty or other reserved rights described that the Tribe graze in common with other non-tribal users, the authorized officer shall allocate any needed reductions to accomplish the legal or resource management objective proportionately among all the permit holders regardless of whether the permit was issued in recognition of a treaty or other reserved right. All affected permit holders will be informed by certified letter that the needed reductions will not take effect for one year from the date of the letter.

51.36 - Fees Charged for Tribal Exercise of Treaty or Other Reserved Rights

The authorized officer shall not charge a fee for any Tribe exercising its treaty or other reserved right to graze on NFS lands.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

51.37 - Internal Review and Coordination

Since Indian tribal treaty and other reserved rights on NFS lands is a highly specialized field, and since most of the Indian treaties are more than 100 years old, authorized officers should consult with their regional rangeland management specialist, regional tribal relations program manager, and the Office of the General Counsel (OGC) before making any decisions regarding the scope and extent of treaty or other reserved rights.

52 - METHODS OF PERMIT ISSUANCE TO EXECUTE TREATY RIGHTS

The Forest Service must honor and authorize treaty and other reserved grazing rights. Grazing permits issued to Indian tribes executing their treaty or other reserved rights, will be issued free-of-charge.

The Agency's authorized officers have the responsibility to manage and regulate all grazing activities on NFS lands, including those guaranteed by treaty.

Accordingly, even though the situation is one of dealing with two sovereign nations, the Tribe must have some type of implementation document to maintain resource conditions. Issuance of some type of document is required to meet Forest Service regulations, database entry and reporting, and resource management and monitoring requirements.

Depending upon how the Tribe, and perhaps in coordination with its individual member(s), chooses to exercise its treaty or other reserved rights, there are only a few different documents that could be used to exercise those rights:

1. A Term Grazing Permit (Form FS-2200-10);
2. A Standard Form Grazing Agreement (Form FS-2200-138);
3. A Temporary Grazing or Livestock Use Permit (Form FS-2200-05);
4. A Special Use Permit (Form FS-2700-4) for a Livestock Area or Convenience Enclosure; or
5. A Contract.

The term grazing permit or grazing agreement, issued for 10 years, are the most preferable types of implementation since, after any necessary regional office and OGC communication, the issuance of the permit will remain at the forest/grassland and ranger district organizational levels and communication and administration will be with district rangeland management specialists.

FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS

A temporary grazing or livestock use permit can be issued; it is generally shorter and simpler. But because it only authorizes grazing use for one year at a time, some may say it does not adequately recognize the sovereignty or permanence of treaty or other reserved rights.

A special use permit is far less preferable than any of the grazing permits since those employees charged with permit administration are generally not familiar with grazing regulations and procedures. In addition, a “livestock area” or “convenience enclosure” on NFS lands is generally much smaller than a grazing allotment and almost certainly smaller than the area upon which treaty or other reserved rights would be exercised.

Term grazing permits cannot be issued for periods longer than 10 years, but they can be, and routinely are, reissued for subsequent 10-year periods provided that the terms and conditions of the permit continue to be satisfactorily met. The special use permits are also issued for 10 years.

Although contracts may be able to be issued to exercise treaty or other reserved rights, they are the least favorable option and should only be used as a last resort. They are usually very detailed, contain far more clauses and conditions, are often very restrictive in nature, likely could be issued for only a short period of time, and would probably be administered by employees unfamiliar with grazing regulations and procedures.

A Memorandum of Understanding (MOU) cannot be used to authorize “occupancy and use” of NFS lands, which is precisely what grazing permits and special use permits do authorize. Neither can cooperative agreements be issued for the purpose of occupying and using NFS lands. If either one of these types of documents is in use to execute tribal treaty or other reserved rights, they should be voided and replaced with a legal document that properly protects both parties.

52.1 - Tribal Ownership of Both Land and Livestock

If the tribe owns the lands that will be declared as the base property—the center of the livestock operation—and also owns the livestock that will graze NFS lands in exercising their treaty or other reserved rights, the grazing authorization (permit) should be issued in the name of the tribe.

The base property may be grant lands, trust lands, or ceded lands, or any combination thereof.

Since the tribe owns both the qualifying land and livestock, the permit should most properly be issued using the Term Grazing Permit form (FS-2200-10). This is the shortest and simplest of the permits. As with other term permits, the allotment map(s) should be attached and the allotment management plan(s) referenced (provided) or attached.

However, if the tribe anticipates that one or more individual enrolled tribal members may be exercising the treaty rights at any time during the 10-year term of the permit, they should strongly consider exercising their treaty rights through issuance of a Grazing Agreement. Depending upon the tribe’s requirements for member ownership of land and livestock, detailed

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

in the accompanying Rules of Management (ROM), this would allow individual enrolled members who do not own both land and livestock to exercise the tribe's treaty grazing rights.

52.2 - Tribal Ownership of Land but not Livestock

If the tribe holds title to grant, trust, or ceded lands, but does not own any livestock with which to exercise their treaty or other reserved rights, the tribe itself does not meet both ownership qualifications necessary to be issued a Term Grazing Permit. In this case, issue a Grazing Agreement in the name of the tribe, based upon ownership of qualifying lands.

The Grazing Agreement allows the tribe to then issue the individual grazing permit(s) to any member(s) of the Tribe who own(s) livestock to be placed on NFS lands.

The agreed-upon ROM would specify any additional land ownership situations that the tribe may allow or require of their enrolled members who are then authorized to exercise the tribe's treaty rights.

52.3 - Tribal Ownership of Livestock but not Lands

Situations may exist in which the tribe owns livestock, either directly or perhaps through a tribal or member consortium, but does not hold title to grant, trust, or ceded lands. This circumstance could exist if the tribal lands have been granted, issued, or sold to individual tribal members.

Since the tribe itself does not meet both ownership qualifications necessary to be issued a Term Grazing Permit, a Grazing Agreement should be issued in the name of the tribe, based upon ownership of livestock.

The Grazing Agreement then allows the Tribe to distribute the use allocated in the document to any enrolled member of the Tribe who owns declared base property—the former tribal grant, trust, or ceded lands.

The agreed-upon ROM would specify any additional land or livestock ownership situations that the tribe may allow or require of their enrolled members who are authorized to exercise the tribe's treaty rights with tribally-owned livestock.

52.4 - The Tribe Owns Neither Land nor Livestock

Rarely would a Grazing Agreement be issued in the name of the tribe since they own neither qualifying lands nor livestock, but such could potentially occur. If that is the case, discussions would need to occur to determine how they would intend to authorize use to one or more tribal members that do own both land and livestock.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

In most cases, the individual tribal member owning both lands and livestock will be qualified to exercise his or her rights through a direct term permit. If the member has acquired either base property or permitted livestock through the usual waiver process, see sec. 53 below.

52.5 - The Tribe and the Members Both Hold Title to the Lands

There are situations where both the tribe and its individual enrolled members hold title to the grant, trust, or ceded lands:

1. There may be intermingled lands, some retained in tribal ownership, and others owned by enrolled tribal members. This situation is not uncommon. In some cases, other parcels may even be owned by non-members; or
2. There may be cases where both the tribe and an individual tribal member appear to own the same parcel(s).

One example of the second situation occurs in the land grant ancestral homelands of some of the Pueblo tribes of New Mexico. A check at the local court house will show that the tribe owns all of the granted or ceded lands. A visit to the Tribal Realty Office or Tribal Land Office will show that some or many parcels of the granted or ceded lands are actually owned by individual enrolled members of the tribe.

In exercising their tribal treaty grazing rights, in both of these cases, it may be appropriate to:

1. Issue a Grazing Agreement to the tribe;
2. Issue a Term Grazing Permit to the tribe, if they also own livestock;
3. Issue a Term Grazing Permit to one or more enrolled tribal members, who own livestock in addition to their owned parcel(s) of the tribal grant or ceded lands; or
4. More than one of the above may also be the case.

Again, because the exercise of tribal rights on NFS land is a complex issue, authorized officers should consult with the regional rangeland management specialist, regional tribal relations program manager, and OGC before making any decisions regarding the authorization and administration of tribal treaty or other reserved rights on NFS lands.

53 - GRAZING BY TRIBES AND TRIBAL MEMBERS ON NATIONAL FOREST SYSTEM LANDS NOT SUBJECT TO RESERVED OR GRANTED TREATY RIGHTS

While much of this chapter is devoted to properly recognizing and permitting tribal treaty grazing rights, the articles and provisions of many or most treaties contain no language as to reserved treaty or other reserved rights for grazing or for pasturing of stock (*see* also sec. 50.4).

FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS

For livestock grazing on NFS lands that is not associated with executing treaty or other reserved rights, the authorized officer shall administer permits issued to tribes and tribal members in accordance with the same policies and procedures that apply to permits issued to non-tribal members.

In such cases where treaty rights do not exist, the enrolled tribal member is no different than any other individual or entity eligible to hold a term grazing permit. If he/she is fully qualified by owning both the land and the livestock, and the livestock are branded with his/her brand properly registered with the State, issue a term grazing permit in his/her name. Authorize use through the annual bill for collection.

Permits that provide for incidental grazing use are covered in section 54 of this chapter.

54 - SPECIAL USE PERMITS THAT AUTHORIZE INCIDENTAL GRAZING USE

Where forage use by livestock is the dominant use of NFS areas, even on small or isolated tracts, a grazing permit is usually issued to authorize use and occupancy when and where feasible.

However, in many instances domestic livestock grazing use is not the dominant use, and it is in the best interest of the United States, due to size, location, adjacent ownership, topography, or efficiency of management, to issue a special use permit instead. All such special use permits are issued and administered by the district or forest recreation staff or special uses administrator.

54.1 - Special Use Permit to Authorize Outfitter and Guide Grazing

The most common type of special use permit that authorizes a significant amount of grazing use is for outfitters and guides. The permit area may be inside or adjacent to an active livestock grazing allotment. A special use permit issued for an outfitter and guide operation may include a provision for the use of forage by the pack and saddle stock utilized by the permit holder as part of his or her operation. These special use permits are usually issued for a ten year term. Refer to FSM 2720 or FSH 2709.14 Chapter 50 for more information.

In the case of outfitter and guide operations, they are usually, and properly, required to comply with the same forage allowable-use guidelines as are holders of grazing permits.

Since rangeland management specialists tend to be in the vicinity of outfitter-guide operations while conducting allotment inspections and monitoring permittee compliance, it would be proper to coordinate with the recreation and special uses staff and assist them with their required inspections. Doing so can help to not only monitor forage utilization levels, but also camp conditions, and to determine that high-lead systems are being used to tether horses rather than halter-ties around single trees.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

54.2 - Incidental Grazing Authorized by Special Use Permit

In limited circumstances, special use permits may authorize the use of forage as incidental to the primary use or activity authorized by the permit.

For example, nearly one complete township in the very northeast corner of a proclaimed national forest is a fenced grazing allotment, and a term grazing permit is issued for that allotment. But eight acres of the NE1/4NE1/4 of Section 1 are cut by a major stream, and the allotment boundary fence is located on the bluff some twenty feet above the river bottom.

Those eight acres of NFS lands in the very northeast corner are fenced into and used with the private landowner's 120 acres of river-bottom lands, which they graze, and also hay, during some part of the year. These acres cannot be used as a part of the grazing allotment above—or by the grazing permittee—during the permitted use season or at any other time of the year.

The only proper way to allow the private landowner to occupy and use that small triangle-shaped portion of NFS lands with all of his adjacent deeded lands is to issue a special use permit. In the example above, the special use permit may be written for such incidental grazing use. Or it might be written to authorize cultivation, since that permit category includes native hay production.

54.3 - Types of Special Use Permits for Incidental Grazing

With few exceptions, there are only two types of special use permits to authorize occupancy for incidental grazing use (see FSM 2720). Both 2720 permits are typically issued for 10-year terms.

1. **Livestock Area** – formerly classified as pasture permits (and, before that, special use pastures). Livestock areas may include acreages that provide little or no grazing, but they are most often those areas that are not logical to manage as a grazing allotment because of size, location, adjacent ownership, or topography (see FSM 2722.15, use code 215). Refer to the example discussed in sec. 54.2 above.
2. **Convenience Enclosure** – this designation covers areas fenced in with private land for the convenience of the permit holder. An example could be a parcel of NFS land severed off as a result of fencing on the easiest or most economically feasible location (this might also apply to the example discussed in sec. 54.2). In a true convenience enclosure, the use of the NFS land is incidental to the operation and management of the permit holder's property (see FSM 2722.41, use code 241).

Again, since rangeland management specialists tend to be in the vicinity while conducting allotment inspections and monitoring permittee compliance, and the special use permit holder may also be a grazing permittee, it would be proper to coordinate with the recreation and special uses staff and offer to complete their required compliance inspections for them.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

54.4 - Expiration and Reissuance of Special Use Permits for Incidental Grazing

As mentioned above, the special use permits for incidental grazing are typically issued for 10-year terms, just as are grazing permits. It is important to properly issue and administer both types of permits, and to minimize workloads whenever possible. But it is even more important to understand that in the previous six decades, on virtually every ranger district in the Agency, those special use permits that could logically be managed as part of an allotment, and issued as a grazing permit, were converted. Special uses policy has not changed in that regard and the policy and procedure still states, “Review existing uses (formerly classified as pasture permits) and convert them to grazing permits as appropriate” (see FSM 2722.15).

Those that remain as special use livestock areas or convenience enclosures have stood the test of time—and several times over. When the next recurring interval comes, there is very little chance that any of those remaining special use permits can, or should, be converted.

Rangeland management specialists and other ranger district specialists who administer grazing permits should coordinate with forest/grassland and district recreation and special uses staff at to work through the process to reissue those 2720 permits as 2230 permits—to include them in a nearby grazing allotment, or make them a separate allotment.

55 - COORDINATION OF RECREATION SPECIAL EVENT PERMITS

For guidance on coordinating recreation special events, see FSH 2209.16, Allotment Management Handbook.

56 - ADMINISTRATION OF “COW CAMPS”

Cow camps normally consist of some form of cabin or other dwelling, often a set of corrals or a small pasture, and occasionally other outbuildings such as tack or feed sheds. A few of the oldest of these structures may have been constructed as “line shacks” during the early days of settlement, and could even precede creation of the Forest Service itself.

If these buildings and corrals are to be used in management of the allotment, they need to be authorized and managed as part of, or in concert with, the term grazing permit.

The type of authorization depends on ownership of the facility. Often ownership is difficult to prove in that records have been lost or never existed, the cabin may or may not be on any tax rolls.

If the permittee asserts and can prove ownership through the provision of tax records, receipts for building materials or labor, deeds, inheritance documents, etc., the authorized officer may accept these documents as proof of ownership. Consult with OGC on individual determinations of ownership.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

56.1 - Government Ownership, Administration through Term Grazing Permit

If the government is presumed to own the improvements, and the determination is made by the authorized officer in consultation with the permit holder(s) affected that they are needed for management of the allotment(s), the improvement will be shown in the Natural Resource Manager Rangeland Information Management System database and the list of assigned improvements in the term grazing permit Part 3. The grazing permittee is required to maintain all the assigned improvements.

The term grazing permit (Part 3), Allotment Management Plan, and Annual Operating Instructions may contain maintenance requirements from the special uses directives and permits (FSM 2720) for cabins and range facilities. These requirements could include fire safety, provisions for inspections, use of propane or other energy sources, sanitation, and herbicide and pesticide use to prevent and control noxious weeds and exotic plants. Because the facility is not available for occupancy or use by the general public, health and safety requirements are applicable, but most Occupational Safety and Health Administration (OSHA) standards are not.

Each of the improvement(s) associated with the cow camp will be entered into the range database as separate items – e.g. individual fences, corrals, line cabins, wells, and so forth, with maintenance assigned to the appropriate permittee.

Normally if a line cabin is used by more than one permittee (such as may occur on a community allotment), maintenance responsibility should still be assigned to only one of the permit holders to avoid situations where everyone is responsible so no one completes the work. If it is shared by more than one permittee on separate individual allotments, specific maintenance responsibilities may need to be assigned to each permittee.

Where the use of the cow camp, corrals, and adjacent pasture support a permittees ability to manage their permitted livestock on an allotment(s) and to authorize use of the facility for any permitted horses necessary to conduct allotment management activities, there will be restrictions and seasonal limitations against use of the facilities for anything other than allotment management.

The cow camp cannot serve as a summer-long recreation residence, nor as a fall hunting camp. Any use of the cabin for outfitting-guiding purposes is strictly prohibited.

56.2 - Private Ownership, Administration through Special Use Permit

If the permittee (or other private party) asserts and reasonably proves ownership, special use regulations (FSM 2720) are the tool to be used if the decision is made to place the facilities under permit.

**FSH 2209.13 - GRAZING PERMIT ADMINISTRATION HANDBOOK
CHAPTER 50 - TRIBAL TREATY AUTHORIZATIONS AND SPECIAL USE PERMITS**

In this case, the use of the cow camp will be authorized as a Range Facility. The use of the cabin alone is shown in FSM 2722.31, use code 231. If the corrals, pens, or pasture (livestock area) are also placed under permit, the use code is 232.

These privately-owned facilities under special use permit are authorized only for use in management of the allotment(s). The standards for use and maintenance of the range facility under special use permit are the same as discussed and required above under a term grazing permit. Health and safety requirements are applicable; OSHA standards are not.

56.3 - Private Ownership, Use Is for More than Allotment Management

If the owner of this range facility has also applied for and been authorized for any type of permitted public-use, such as an outfitter and guide operation, then the facility is subject to OSHA standards for public occupancy and maintenance as well as for meeting safety and health requirements.

56.4 - Administration Coordination under the National Register of Historic Places Heritage Resources

Regardless of the type of permit issued to authorize the use and occupancy of the cow camp and its other structures and pastures, the permittee(s) is solely responsible for the continued annual maintenance of the facilities.

When the cow camp has been in existence for 50 years or more, the National Register of Historic Places (NRHP) evaluation should be completed. Discussions might ensue as to different maintenance standards that may be required if the building (and perhaps any appurtenant structure) is potentially eligible for nomination to the National Register.

If the property is eligible for nomination, it is not a certainty that the structure will have to be maintained to original standards or with materials that mirror the originals.

It is important to inspect and evaluate the cow camp not only in its individual historic context for NRHP nomination or inclusion, but also in relation to the historic context of other similar facilities on the ranger district or even across the entire forest and adjacent forests.

The integrity of the cow camp is a crucial part of the facility evaluation, and continual and proper maintenance of the structure(s) keeps the cow camp (and any appurtenant structures) in a “context of use” rather than just the historical context so that any upgrades, modifications, or critical maintenance to the facilities will reflect historic and on-going use of the property.